

Supreme Court, U. S.  
**FILED**

**JUN 8 1978**

No. 77-1435

**MICHAEL RUDAK, JR., CLERK**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1977**

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**LEO D. SMITH, PETITIONER**

**v.**

**UNITED STATES AIR FORCE, ET AL.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**MEMORANDUM FOR THE RESPONDENTS  
IN OPPOSITION**

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**WADE H. MCCREE, JR.,  
Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.**

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Petitioner, Leo D. Smith, seeks judicial review of his discharge from civil service employment. Although he has relied on inapposite provisions,<sup>1</sup> we assume the district court had jurisdiction to entertain petitioner's complaint under 28 U.S.C. 1331(a), as amended by Pub. L. 94-574, 90 Stat. 2721.

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<sup>1</sup>Petitioner now invokes subject matter jurisdiction under 5 U.S.C. 701 and 7501. However, the Administrative Procedure Act "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107.

In his initial complaint filed in the United States District Court for the Western District of Texas, he alleged jurisdiction under Title VII of the Civil Rights Act, as added, 86 Stat. 111, 42 U.S.C. (Supp. V) 2000e-16, and under the Federal Tort Claims Act, 28

On the merits, however, we submit that both courts below correctly held that petitioner's refusal to submit to a psychiatric examination constituted just cause for his discharge, that he had been accorded due process, and that the administrative actions complained of were neither arbitrary nor capricious. See, e.g., *Yates v. Manale*, 377 F. 2d 888 (C.A. 5), certiorari denied, 390 U.S. 943; *May v. United States Civil Service Commission*, 230 F. Supp. 659 (W.D. La.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General.*

JUNE 1978.

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U.S.C. 1346(b). However, both the district court and the court of appeals correctly held that jurisdiction would not lie under either of these statutes because petitioner had not alleged that he was discriminated against on the basis of his race, color, religion, sex or national origin and because the United States would not have been liable for the manner in which petitioner was discharged had it been a private individual.